

Georgia Open Records/Open Meetings Social Media and the Right to Record

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Two Life Lessons

- The Law is always behind the times when it comes to technology
- People do dumb things when it comes to technology



First Amendment

- Can we block people or delete their comments?
 - Be Careful because you will likely get sued

Sheriff's office agrees to stop banning negative Facebook comments

Facebook Fight

Sherry Love our sheriff.

come!

God bless all of you



First Amendment

- Content Limitations v. Viewpoint Limitations



First Amendment

- Is the social media site maintained by the government itself?
- If so, how is information posted to the site?
- Are public comments allowed on the site?
 - If so, then a limited public forum has likely been created!



First Amendment

- There is very limited case on how the First Amendment interacts with social media, but the case law is growing
- Early cases indicate blocking people is seen as viewpoint based and basically a no-no
- Early cases also indicate a mixed bag when it comes to deleting comments



First Amendment

- What about hiding public comments from view?
- What about banning comments which pose threats, profanity, or offensive and inappropriate comments?
- What can we do?



First Amendment

- What are some possible results of a lawsuit?
 - Government could be found to have unlawfully retaliated



First Amendment

- Can employees lose their jobs for things they post on personal social media pages?
- How is the social media site created and maintained?
- Does the posting color or impact the person's ability to do their job?



Ga. deputy fired for racist Facebook posts, targeting black motorists



First Amendment

- New technology and old law!
 - Pickering v. Board of Education, the U.S. Supreme Court established the balancing test weighing the government employer's interest in promoting the efficiency of performing the public services with the First Amendment rights of the employee as a citizen



First Amendment

- New technology and old law!
 - Public employees must show that the speech involved a matter of public concern rather than one of personal interest
 - If an employee is making statements related to their official duties then they are not speaking as a private citizen and their statements are not protected from potential discipline.



Open Records

- Are social media posts subject to open records laws?
- What if I posted it from my personal phone/computer?
- Who cares? How can they get materials off of my personal device anyway?



Local Government Records Retention Schedules

- How long must records be stored?
- What kinds of records are social media posts?
 - Does it matter who makes the post?
 - Should we regulate who can make posts?
 - How can some of this be accomplished?



Local Government Records Retention Schedules

- Typically, social media posts are classified as “Correspondence”
 - Administrative Correspondence must be kept permanently
 - General Correspondence must be kept for five years
 - Transitory Correspondence must be kept for the useful life



Copyright

- Are government operated social media pages required to comply with copyright law?
- Is there sovereign immunity if we mess up?
- What if it does not say copyright?

Copyright

- Pitfalls
 - Unauthorized use of photos, videos, text without permission
 - Sharing content without linking to the source
 - Assuming something is “Fair Use”
 - What is fair use?



The Intersection of Public and Private Pages

- When does a personal social media page become a public social media page?
 - Litigation involving President Trump may be the guide
 - 2nd Circuit held that his Twitter page had become a public forum and he was acting in a governmental capacity when he blocked people



The Intersection of Public and Private Pages

- Lessons:
 - Just because you created the social media page as a private citizen does not mean it will remain as a private page
 - Keep your private and professional lives separate



Best Practices

For maintaining an account used to communicate with constituents and the public about official duties and activities, keep the following in mind:

- Consult with Counsel before...
- Blocking users in response to comments or posts
- Removing comments posted by users
- Limiting users' access to any interactive features



Best Practices

- If concerned about a social media platform's community standards being violated, make a complaint to the platform rather than blocking a user
- Develop social media policy at the office, city, or county level
- If an official page is limited to a specific purpose or topic, make sure that limitation is clearly communicated on the page



Best Practices

To minimize risk of First Amendment violations, keep the following in mind:

- Do not associate official title, government address, or government email with the account
- Do not encourage constituents or the public to use the account as a means to contact the official.
- Do not link the account to any official social media accounts -- either the owner's or the their public office's.
- Do not refer to or re-post comments from the personal account on official social media accounts.
- Avoid including photos taken in an official setting or engaged in official business
- Limit posts related to official activities or events, and address any such posts explicitly to friends and family
- Set the account to be private rather than public

If any of these items are not checked account, it creates ambiguity where a court may find that it is an official page



First Amendment Auditors

- When individuals or groups (“Auditors”) film on government property to test their rights to film or enter a public space.
- Confrontational audits, or ones where government employees interfere with filming, are often posted to YouTube.



First Amendment Auditors

The Public Cannot....

- Interfere with the Officer Physically
- Get within arrest periphery
- Violate another law



First Amendment Auditors

- The right to access public property and the standard by which limitations upon free speech exist differ depending on the character of the property.
- Courts have defined three types of public property:
 - Public Forums
 - Designated Public Forums
 - Nonpublic Forums



Public Forums

- An area that has been traditionally used for expressive activity like assembly or debate.

- Streets, sidewalks, public parks

Speech Limitations

- Government may enforce reasonable time, place, and manner of expression restrictions which are content neutral , narrowly tailored to serve a significant government interest , and leave open ample alternative channels of communication.



Designated Public Forums

- Public property the state has opened for use by the public as a place for expressive activity.
 - University meeting facilities, school board meetings, municipal theaters, city council meetings
- Speech Limitations
- Government may enforce reasonable time, place and manner restrictions.
 - Content-based prohibitions must be narrowly drawn to achieve a compelling state interest.



Non Public Forums

- Public property which is not by tradition or designation a forum for public expression (a.k.a. all other public property).

- Military bases, polling places, prisons, airport terminals

Speech Limitations

- Government may enforce reasonable time, place, and manner of expression restrictions which are content neutral to the property and compatible with the intended use of the property
- For example, courts have allowed limitations that prevent employees from being interrupted while performing work on the property.



Recording Rights

- The right to record is protected by the First Amendment.
 - Specifically, the public may record police officers conducting official police activity in public areas.
- This is a relatively new protection and, therefore, the standards by which government may limit this right are not well defined.
- Generally, public officials may place reasonable time, place, and manner restrictions on this right if the restrictions are necessary to maintain safety and control. Confidentiality concerns also support the imposition of restrictions (e.g., client confidentiality in human services.)



Police Can Request, But Cannot Require

1

Identity

2

Reason for
filming

3

Stop
filming
(unless
interfering)

4

Delete
images

5

Move back
(unless in
arrest
periphery)

6

Hand over
the
camera or
device

7

Passcode
for device

How it Works

- Auditors may circle the property while filming or attempt to enter facilities, including open garages or spaces that have unlocked doors.
- Auditors will usually be openly filming.
- Auditors usually know their rights related to filming public spaces and officials, when they must provide identification, under what circumstances they may be detained, and other rights.



How it Works

- Auditors take on different styles: some are quiet and unassuming while other auditors may be openly vocal and even try to bait employees into an argument by being disrespectful, rude, and condescending.
- Auditors will usually not identify their reason for recording or provide identification if asked.
- Auditors expect to be confronted.
- Some are prepared to be detained and arrested.



How it Works

- This raises three questions:
 - Query 1 : What type of encounter is bound to be posted to social media, used by the media, and used to gain followers?
 - Query 2 : What type of opportunities will you provide them?
 - Query 3 : When engaged, what type of encounter will you provide them?



Recent Georgia Cases

<u>Case</u>	<u>Facts</u>	<u>Outcome</u>
• Calhoun (Atlanta)	Interference with citizen's videos	Settled with new policy (2009)
• Anderson (Atlanta)	Arrests of citizen filming arrest	Settled with new policy (2010)
• Copwatch (Atlanta)	Copwatch video interference	Settled (2011)
• Tisdale (Cumming)	Arrest of citizen filming meeting	Settled (2015)
• Ruch (Atlanta)	Arrest of journalist filming arrest	Lost pre-trial (2019)
• Toole (Atlanta)	Arrest of citizen filming	Settled (2019)
• Dunn (Fort Valley)	Arrest of citizen filming	Settled (2020)
• Dunn (Marshallville)	Arrest of citizen filming	Settled (2021)
• Hassan (Atlanta)	Arrest of journalist filming arrest	Pending (2022)
• Randolph (Newton)	Arrest of citizen filming	Pending (2022)



Recent Georgia Cases

Court decisions are most often grounded in First and Fourth Amendments.

As Judge Tilman Self, in the federal Middle District of Georgia, ruled in 2020 in the *Dunn* case, after a citizen was arrested while filming disability access to a government building:

“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest. Pretty simple rule.”



Best Practices

- **Prior to an Event:**
 - Identify and mark nonpublic forums. Mark restricted areas such as garages, hallways, cubicles, offices and workspaces with signs that define access.
 - Educate employees . All public-facing employees should have familiarity with First Amendment audits and how to respond to them.
 - Preserve Security. Areas marked as restricted access must be kept secure. Doors must be closed and locked. Windows must be secured. Access must be privileged and only for legitimate purposes
 - Enforce Policies and Expectations of Employees . Employees must be accountable for preserving security. If the area presents a safety issue, then discipline like it does.



Best Practices

- During an Event:
- Don't:
 - Overreact, attempt to take the recording device, arrest or detain because they are recording, or follow or intimidate them
- Do:
 - Stay calm, be polite and patient, act with good behavior under personnel practices, comply with city policies, let them film as long as they are not committing a crime or disrupting the use of the property
 - Constantly be aware of the First Amendment Rights



Questions?

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